

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 21, 2005 Session

REESE L. SMITH v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2003-I-524 Cheryl Blackburn, Judge**

No. M2005-00402-CCA-R3-PC - Filed March 10, 2006

This is an appeal as of right from denial of post-conviction relief. Upon entry of a guilty plea, the Petitioner, Reese L. Smith, was convicted of one count of impersonating a licenced professional, to wit: an attorney. See Tenn. Code Ann. § 39-16-302. Pursuant to a plea agreement, the Petitioner was sentenced to a term of eighteen months to be served on probation. The Petitioner filed a petition for post-conviction relief. Following an evidentiary hearing, he was denied relief. The Petitioner now appeals the denial of post-conviction relief, arguing several issues, all of which we are unable to address because the claims are either not proper issues for a post-conviction proceeding, not properly preserved for review, or not reviewable due to an inadequate record. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Reese L. Smith, Pro Se.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

As stipulated at the plea acceptance hearing, the facts surrounding the conviction at issue in this case are as follows:

Had this case gone to trial, the State's proof would have been that on August 23rd, 2001, the [Petitioner] held himself out as an attorney, met with Debbie [Sparks] and her son, Robert, and reviewed pending charges and the pending Court date that were against Robert, Ms. [Spark's] son. He then advised them that he would come

to Court and represent Robert. The fee was a thousand dollars, which Debbie Sparks paid seven hundred and fifty dollars as a down payment and she was supposed to pay him the remaining two hundred and fifty dollars once the [Petitioner] won their case. On the Court date, the Petitioner did not show up. It was later determined that the [Petitioner] is not an attorney.

All this occurred here in Davidson County.

On June 9, 2003, the Petitioner appeared in General Sessions Court and waived his right to a grand jury indictment, electing instead to proceed on a criminal information charging him with unlawfully and intentionally impersonating an attorney. Several days later, on June 19th, the Petitioner appeared in Davidson County Criminal Court and entered a plea of guilty as charged.

The record reflects that at this plea acceptance hearing the Petitioner, through counsel, first informed the court that he did not wish to enter a guilty plea, and that he was prepared to present evidence demonstrating he was not guilty of the crime for which he was charged. The court struck the criminal information and set a new bond at \$75,000. Later the same day, the Petitioner again appeared before the court and expressed his desire to plead guilty to the offense for which he was charged. Conducting a thorough plea colloquy, the court asked the Petitioner, among other questions, if he wished to waive his right to a grand jury; if he was satisfied with his attorney's representation; if he wished to waive a jury trial and the opportunity to present evidence; and if he wished to waive his right to an appeal. To all of these questions the Petitioner answered in the affirmative. When asked if anyone was coercing him into accepting the plea agreement, the Petitioner answered, "no." The Petitioner also stated that the facts of the offense, as stated by the prosecutor (and quoted above) were true.

At the conclusion of the hearing, the Petitioner entered a plea of guilty, and the court accepted his plea, entering a judgement of conviction against the Petitioner for impersonating an attorney in violation of Tennessee Code Annotated section 39-16-302, a Class E felony. Pursuant to the plea agreement, the Petitioner was sentenced as a Range I, standard offender to an eighteen-month sentence, which was immediately suspended for service of eighteen months on probation. The Petitioner was also ordered to pay \$750 in restitution.

In March of 2004, the Petitioner filed a pro se motion for "Relief from Judgment and/or New Hearing," which the trial court determined failed to state a cognizable claim. The Petitioner was allowed ten days to file an amended petition, and he responded by filing four pro se documents. The first pleading was a petition for post-conviction relief alleging that his attorney provided ineffective assistance of counsel and that his plea was involuntary.¹ At a July 2004 status hearing, scheduled to determine how the Petitioner wished to proceed given his multiple motions, the Petitioner informed the court he desired to pursue post-conviction relief. The record reflects that the trial court cautioned the Petitioner about continuing his post-conviction proceedings pro se, but the "Petitioner

¹His other pro se motions included: "Motion for Relief from Judgment and/or New Hearing Amended for Petition for Post Conviction Relief," "Motion for Prosecutorial Misconduct, Malicious Prosecution and a New Hearing," and "Special Motion Amended." The last motion simply requested an extension of time to prepare additional pleadings.

affirmatively indicated he was prepared to represent himself.” The first post-conviction evidentiary hearing was set for October of 2004, but on this date the Petitioner failed to present a certified copy of his plea hearing transcript. The court reminded the Petitioner that a post-conviction proceeding is not a vehicle to re-litigate the facts of a case, and set a second post-conviction hearing for December of 2004.

The Petitioner has failed to include a transcript of the December 8, 2004, post-conviction hearing in the record on appeal. The post-conviction court stated in its order denying post-conviction relief that the Petitioner’s attorney (“Counsel”) testified at this hearing that while at the General Sessions level, the Petitioner indicated he wanted to waive his right to bind the proceeding over to the grand jury and elected to proceed on the criminal information. However, when the Defendant actually appeared in Criminal Court for what was to be his plea acceptance hearing, the Petitioner had changed his mind. Counsel informed the Petitioner that if he wished to strike the agreement, “per Judge Dozier’s policy” his bond would be revoked. The Petitioner’s bond was revoked, and he was taken into custody.² Counsel testified that the Petitioner was “upset” upon his transfer to jail, and expressed his desire to proceed with the guilty plea. Accordingly, the Petitioner and Counsel reappeared before the court and a guilty plea was entered.

According to the order entered by the post-conviction court, the Petitioner testified at the post-conviction hearing that Counsel failed to present newly discovered evidence when he appeared at the plea acceptance hearing. The post-conviction court “repeatedly stressed” to the Petitioner that it was “not the proper court procedure” to present evidence at a plea acceptance hearing.

In February of 2005, the post-conviction court issued an order denying post-conviction relief. The court found that the Petitioner “failed to state a cognizable claim for post-conviction relief.” Additionally, the post-conviction court noted that the Petitioner expressly informed the trial court at the plea acceptance hearing that he was satisfied with Counsel’s representation, and also denied that he had been forced to enter a guilty plea. Accordingly, the post-conviction court found the Petitioner’s allegations of ineffective assistance of counsel and an involuntary guilty plea were without merit, and denied post-conviction relief. This appeal followed.

ANALYSIS

The Petitioner has submitted to this Court a pro se appellate brief with no citation to the record, no citation to applicable authorities, and in which every issue raised is either not cognizable in a post-conviction proceeding, not preserved for appellate review, or is not addressable by this Court because of an incomplete record. Accordingly, we are unable to address the merits of any of the issues raised by the Petitioner in this appeal.

² Apparently, the Petitioner had made his initial bail, but upon declining the plea agreement, this bail was revoked, and a new bail amount of \$75,000 was set. The Petitioner claims in his appellate brief that he was unable to make this higher bail amount and therefore felt coerced into accepting the original plea agreement.

The Petitioner's "statement of the issue presented for review" as presented in his initial appellate brief is less than perspicuous.³ After having reviewed all of the Petitioner's multiple briefs in their entirety, we believe the essence of the claims raised by the Petitioner on appeal are as follows: (1) the State provided insufficient evidence to sustain a conviction, (2) the Petitioner's due process rights were violated due to prosecutorial misconduct and conspiracy, and (3) the Petitioner's trial-level attorney provided ineffective assistance of counsel which led to his involuntary plea of guilty. In what we believe to be a reply brief,⁴ the Petitioner concentrated his arguments on supporting the claims of ineffective assistance of counsel and an involuntary plea.⁵

I. Post-Conviction Standard of Review

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

II. Issues Not Properly Before this Court

We are unable to address the merits of any of the issues presented in this appeal because we find the Petitioner's claims are not properly before this Court. As to all claims, we find the Petitioner has failed to properly cite to the record or appropriate authorities. As to the specific claims, the Petitioner first raises a sufficiency of evidence issue, which, while proper for review in a direct appeal from a trial, can not be collaterally pursued through a post-conviction proceeding. The Petitioner also raises, for the first time, due process violation claims. These claims were not

³The Petitioner describes the issue presented for review as follows:

The steps the court should have taken wasn't taken if the case was processed in the order of the court I would not be in the Appellate Court filling [sic] an Appeal. With D.A. Amy Eisenbeck with holding [sic] evidence of proof she should have told [Counsel] what she was told. After having two folks in court waiting for me to come out they both herd [sic] the conversations between [Counsel]/Debbie Sparks. They also heard the D.A. Amy Eisenbeck question Debbie Sparks and her son. If the state had the evidence against me then why did they have the witness in court or any other evidence to prove thier case on June 19th 03 with out [sic] any evidence how could they convict me of a crime.

⁴This document is titled "RESPONSE TO THE JUDGMENT OF THE DAVIDSON COUNTY CRIMINAL COURT."

⁵We note that the Petitioner also filed a third brief, titled "Amended BRIEF OF THE APPELLANT." However, this brief, consisting of one paragraph, merely incorrectly asserts that the Petitioner's information indicated a warrant was issued for his arrest the same day the crime of impersonating an attorney was alleged to have taken place, and again lodges a complaint over the fact that his "witnesses" were not allowed to testify during the post-conviction proceedings.

raised in his petition for post-conviction relief or addressed by the trial court and are therefore waived. Finally, as to the cognizable post-conviction claims of ineffective assistance of counsel and an involuntary plea, the Petitioner has failed to provide the requisite record necessary for this Court to review these issues.

A. Failure to cite to the record or to authorities.

Our Court requires that petitioners, on appeal, present an argument, make appropriate references to the record, and cite relevant legal authority in support their arguments. See Tenn. Ct. Crim. App. R. 10(b).⁶ Additionally, all Tennessee appellate courts require the appellant’s brief to contain an argument, citations to authorities, and appropriate references to the record. See Tenn. R. App. P. 27(a)(7).⁷ Failure to comply with these basic rules will ordinarily constitute a waiver of the issue. See Tenn. Ct. Crim. App. R. 10(b); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000).

In his initial brief, reply brief and amended brief, the Petitioner makes no reference to the record and fails to “cite” to any authority in support of his argument.⁸ Under these circumstances we are not obligated to review any of the Petitioner’s issues as they are presented. See State v. Keller, 813 S.W.2d 146, 150 (Tenn. Crim. App. 1991) (“Bald assertions unaccompanied by legal argument or citations to authorities are waived.”). This Court could overlook these deficiencies if the Petitioner otherwise presented cognizable post-conviction claims and provided an appellate record sufficient to properly review the trial court’s findings. Unfortunately, the Petitioner has failed in these respects as well.

B. Issues not subject to post-conviction relief

A collateral attack on a conviction or sentence under Tennessee’s Post-Conviction Procedure Act is limited to claims that allege an “abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States” that render the conviction or sentence void or voidable. Tenn. Code Ann. § 40-30-103. However, post-conviction proceedings “cannot be used as substitutes for direct appeals, or to test the sufficiency of the convicting evidence, or to re-litigate matters of fact already put to rest upon the trial. Post-conviction petitions properly go only to constitutional rights’ abridgments in the conviction process.” Sloan v. State, 477 S.W.2d 219, 220 (Tenn. Crim. App. 1971).

⁶“Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”

⁷“An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on.”

⁸The Petitioner lists several statutes and rules of procedure and evidence at the beginning his appellate brief in a section titled “Table of Authorities.” However, these “authorities” seem to have been chosen at random, and no nexus between these authorities and any argument or claim presented elsewhere in the brief is made.

Post-conviction proceedings are especially significant to Petitioners who have pled guilty, thereby waiving their right to a direct appeal. Our supreme court noted that “[f]ailing to preserve an appeal from a plea of guilty generally forecloses any direct attack upon such a plea, but if the errors of which the defendant is complaining are of Constitutional dimensions, post-conviction proceedings are available.” State v. McClintock, 732 S.W.2d 268, 271 (Tenn. 1987) (internal citations omitted). Nonetheless, the supreme court also clarified that “[p]ost conviction relief is not a forum to review errors of law as a substitute for direct appeal.” Id. at 272.

In this case, the Petitioner raises a sufficiency of evidence claim that is not cognizable in a post-conviction proceeding. The Petitioner has devoted the majority of his appellate brief to arguing that he was factually innocent and therefore the state failed to provide sufficient evidence to convict him of the crime for which he was charged.⁹ We again note that the Petitioner’s conviction rests upon a guilty plea and the Petitioner waived his right to trial. At the guilty plea submission hearing, the Petitioner agreed that the factual basis provided by the prosecutor was “true and correct.” Nonetheless, the Petitioner repeatedly argues that he now has evidence that will “prove my hole [sic] case was a lie,” and that the “state never proved its burden of proof” and “never presented any evidence against me.” However, it is well settled law that “post-conviction proceedings may not be employed to question or review or test the sufficiency of the evidence” Myers v. State, 462 S.W.2d 265, 267 (Tenn. Crim. App. 1970).

It is clear from the Petitioner’s repeated arguments that he is attempting to use this appeal to introduce evidence which he believes proves he was not guilty of the crime of impersonating a licenced attorney.¹⁰ However, the Petitioner waived both his right to force the State to prove he was guilty and his right to appeal a guilty verdict when he accepted the plea agreement and entered a plea of guilty. It is long settled law that a petitioner may not litigate his guilt or innocence in a post-conviction proceeding. See Workman v. State, 868 S.W.2d 705, 711 (Tenn. Crim. App. 1993). Accordingly, we find that the Petitioner’s claim of insufficient evidence or actual innocence, however phrased by the Petitioner, has been waived, and it is not a proper issue for a post-conviction proceeding.

C. Issues not properly preserved for appellate review

The Petitioner also argues that he was denied his right to due process at the trial level because of (1) prosecutorial misconduct, and (2) a conspiracy between the court, the prosecution and his own

⁹ According to the record, what the Petitioner believes to be exonerating evidence consists of two witnesses who overheard a conversation at a preliminary hearing between the prosecutor, his own attorney and the victim in which the victim allegedly said the Petitioner never claimed he was an attorney.

¹⁰ Indeed, the record reveals that the Defendant has repeatedly attempted to present evidence, always in a manner inconsistent with proper procedure, which he believes exonerates him from the crime to which he pled guilty to. As noted above, he filed a “Motion for Relief from the Judgment and/or New Hearing” alleging he had new evidence in March of 2004, but at a status hearing in July of 2004, the Petitioner elected to precede with his contemporaneously filed post-conviction petition. More recently, in November of 2005, this Court denied a request by the Petitioner to supplement the record with witness statements, noting that the record on appeal must consist of only evidence entered at the trial court level. See Tenn. R. App. P. 24.

attorney to “work together to convict [him] of a crime they all knew [he] did not commit.” While his accusations of prosecutorial misconduct and conspiracy are not supported by any citations to the record or relevant authority, a claim of a Constitutional due process violation may qualify as a valid post-conviction issue. Nonetheless, the Petitioner failed to present these issues in his post-conviction petition and therefore they “may not be raised for the first time on appeal.” State v. Townes, 56 S.W.3d 30, 35 (Tenn. Crim. App. 2000), overruled on other grounds by State v. Terry, 118 S.W. 3d 355, 359 (Tenn. 2003). See also Tenn. Code Ann. § 40-30-106(g) (“A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented”). Moreover, the post-conviction statutes expressly require that all known post-conviction claims be raised in the initial petition. See Tenn Code Ann. § 40-30-104(d) (“The petitioner shall include all claims known to the petitioner for granting post-conviction relief and shall verify under oath that all such claims are included.”).

In this case, the appellate record before this Court does not indicate that the allegations of prosecutorial misconduct or a conspiracy, or even the general claim of a due process violation, were raised in the petition for post-conviction relief or brought before the court at the post-conviction hearing. Accordingly, these issues are also deemed waived.

Moreover, we note that the Petitioner has failed to point to any evidence in the appellate record to substantiate his claims of a due process violation. The Petitioner alleged in his appellate brief that “the state planted false evidence and knew the evidence against me was fraud,” and that “Judge Dozier, [prosecutor] Amy Eisenbeck and [Counsel] work[ed] together to convict me of a crime they all knew I did not commit.” However, the Petitioner failed to support any of these allegations with citations to the record. We have previously held that “[m]ere allegations of conspiracy are insufficient for this Court to find that such a criminal enterprise existed.” Keller, 813 S.W.2d at 150. Also, the Petitioner failed to direct this Court to any evidence that the alleged prosecutorial misconduct “could have affected the verdict” to his “prejudice” considering his conviction was based on his guilty plea. State v. Smith, 803 S.W.2d 709, 710 (Tenn. Crim. App. 1990). Thus, had these issues not been procedurally waived, we would find them to be without merit.

D. Issues waived for failure to provide a record

The Petitioner does raise one claim that is properly before this Court on an appeal of a denial of post-conviction relief. His claim of ineffective assistance of counsel leading to an involuntary guilty plea is a cognizable claim in a post-conviction proceeding. This claim was included in his initial petition for post-conviction relief and was addressed by the post-conviction court. However, this Court is unable to address the merits of this claim on appeal because the record is incomplete: the Petitioner has failed to provide a transcript of his post-conviction hearing.

When a petitioner seeks appellate review he bears the duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis

of his appeal. See Tenn. R. App. P. 24(b);¹¹ State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). When the record is incomplete because it fails to contain a transcript of a proceeding relevant to an issue or issues presented for review on appeal, this Court is precluded from considering those issues. See Ballard, 855 S.W.2d at 561. Moreover, absent the necessary relevant material in the record, we cannot consider the merits of an issue and must “conclusively presume the judgment of the trial court was correct.” State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990). See also State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990) (“In summary, a defendant is effectively denied appellate review of an issue when the record transmitted to the appellate court does not contain a transcription of the relevant proceedings in the trial court”). Furthermore, we note that “[p]ro se appellants are required to comply with the relevant statutes, rules and common law just as those who are represented by counsel.” Keller, 813 S.W.2d at 150.

In both his appellate and reply brief, the Petitioner asserts multiple allegations that his trial counsel provided constitutionally deficient representation. Among other charges, the Petitioner claims his trial attorney: failed to present exculpatory evidence at his guilty plea hearing; “intimidated” him into pleading guilty; never explained his rights to him; threatened to revoke his bond if he did not plead guilty; addressed him using profanity; inappropriately confronted his wife; and lied to the court and “withheld information that could have cleared [the Petitioner].” Because of this ineffective assistance of counsel, the Petitioner argues, he was forced to enter a guilty plea he now claims was involuntary. However, the Petitioner makes no reference to the record to support these allegations, and has failed to provide a transcript of the post-conviction hearing where, presumably, evidence was presented pertaining to his claims of ineffective assistance of counsel.

The post-conviction court, in its order denying relief, did make findings of fact on the issues of an involuntary plea and ineffective assistance of counsel. The court found that the Petitioner’s argument—that his counsel was ineffective for failing to present what he believed to be exculpatory evidence at his guilty plea hearing—was so lacking in merit that it failed to comprise a cognizable post-conviction claim. The court also stated in its order that it “repeatedly stressed to the Petitioner” that this claim failed because attempting to present evidence at a guilty plea hearing “is not the proper court procedure” and “not the appropriate time to raise new evidence before the [c]ourt.” Rather, the post-conviction court correctly explained, the Petitioner’s options at his initial appearance before the trial court were to “either enter his plea as he did or strike the General Sessions agreement and proceed on a trial schedule.” Noting that while the Petitioner may not have “like[ed] these options,” he nonetheless opted to enter a guilty plea. Therefore, the court found the “Petitioner failed to state a cognizable claim for post-conviction relief.”

However, the court also addressed the merits of the Petitioner’s claims of ineffective assistance of counsel and an involuntary plea, and in doing so, expressly discredited the Petitioner’s allegations made during the post-conviction proceedings. Rather, the court accredited the Petitioner’s testimony at his plea hearing in which he testified that he was “satisfied” with his

¹¹ “[T]he appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.”

attorney's representation, that no one "forced" him to enter his guilty plea, and that he did commit the crime for which he was charged.

Absent a transcript of the post-conviction evidentiary hearing, this Court must presume the judgment of the trial court is correct. See Draper, 800 S.W.2d at 493. Because the Defendant failed to provide a record that conveyed a fair, accurate and complete account of what transpired at the post-conviction hearing, we are compelled to find he has waived these issues as well. See State v. Wallace, 664 S.W.2d 301, 302 (Tenn. Crim. App. 1983) ("We will not consider those issues for which the record is inadequate. It is not the duty of this Court to sort out and labor through issues not properly presented."). Accordingly, the Petitioner's claim of ineffective assistance of counsel and the related claim of an involuntary guilty plea are waived.

CONCLUSION

Based on the above reasoning and authority, we find the Petitioner has waived the issues he attempted to present to this Court on appeal. We affirm the judgment of the trial court denying the Petitioner post-conviction relief.

DAVID H. WELLES, JUDGE